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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

DEMOCRATIC NATIONAL COMMITTEE, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Democratic National Committee hereby petitions for a writ of certiorari of the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment in *Democratic National Committee* v. *Federal Communications Commission,* No. 71-1637, which was decided on February 2, 1972, together with *Republican National Committee* v. *Federal Communications Commission,* No. 71-1723, in a single opinion.

OPINIONS BELOW

The court of appeals' opinion has not yet been officially reported and is reprinted as Appendix A to this petition. The opinion of the Federal Communications Commission, which was affirmed by the court of appeals, is reported at 31 F.C.C.2d 708 (1971) and is reprinted as Appendix C to this petition.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1972. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's application of the fairness doctrine to deny requests by petitioner to respond to three appearances by the President on the major television networks conflicts with the overriding First Amendment right of the public to be fully informed on all controversial issues that affect the conduct of government?

2. Whether in denying petitioner the right to respond to three appearances by the President on the major television networks the Commission construed the fairness doctrine in a manner that conflicts with the "public interest" standard of the Communications Act of 1934?

3. Whether the procedural burdens imposed on fairness doctrine complainants by the Commission deny fundamental fairness and are inadequate to safeguard the First Amendment interests at stake in such proceedings?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

The following provisions of the Communications Act of 1934 are pertinent to the issues in this case:

> *47 U.S.C.* § *307:* (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.
>
> * * *
>
> *47 U.S.C.* § *315:* (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast.
>
> (2) bona fide news interview.
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[1]

STATEMENT OF THE CASE

This case arises from the efforts of the Democratic National Committee (DNC) to have the Federal Communications Commission compel the three major television networks to provide DNC with time to respond to three separate television appearances by President Nixon in March and April, 1971. The Commission denied the relief sought, and the court of appeals affirmed the Commission's ruling.

A. The Presidential Broadcast Appearances at Issue

1. *"Today" Show Interview:* On March 15, 1971, President Nixon was interviewed by Barbara Walters on the National Broadcasting Company's (NBC) "Today" show. The interview consumed the entire program that morning, except for time devoted to commercials and regular news features. The interview focused

[1] Subsequent to the court of appeals' decision in this case, § 315 (a) of the Communications Act of 1934 was amended by Title I of the Federal Election Campaign Act of 1971, Act of Feb. 7, 1971, Pub. L. No. 92-225. The amendment added the words "under this subsection" to the third sentence of § 315(a). That amendment has no direct bearing on the issues in this case.

on the President's family life, the effect of his public career on his wife and family and to the role of his wife in his decisions as a public official. During the course of the interview, the President had an opportunity to express his views on a number of important and controversial public issues. DNC requested in a telegram to NBC that Democratic Party leaders be afforded similar exposure on the "Today" show because the President had discussed controversial issues of public importance and because the interview had afforded the President a rare opportunity to cast his image with the electorate in the best possible light. NBC denied the request.[2]

2. *March 22 Interview:* On March 22, 1971, the American Broadcasting Companies (ABC) presented a program entitled "A Conversation With the President" which was devoted exclusively to a one-hour interview of President Nixon by Howard K. Smith. The program was broadcast over ABC television and radio from 9:30 to 10:30 p.m., EST. The major portion of the interview related to an explanation of the President's policies in Vietnam. The President claimed success for his policies, blamed previous Democratic administrations for the conflict in Vietnam and rationalized his opposition for fixing a date certain for withdrawal of all American troops, a position that conflicted with that of the Democratic Party. The President also sought to justify his veto of an election reform bill that had widespread Democratic support and explained the rationale for his revenue-sharing proposals to Congress. ABC rejected DNC's request for time to respond to the interview.[3]

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[2] App. A, p. 4a.

[3] App. A, pp. 4a-5a.

3. *April 7 Indochina Address:* The three major networks—NBC, ABC and Columbia Broadcasting System (CBS)—gave President Nixon free time on April 7, 1971, to address the nation on his policies and programs in Indochina. The address was carried simultaneously on the three networks commencing at 9 p.m., EST. The address was a forceful defense of the President's Vietnam war policies. It was also highly partisan in tone. The President placed the blame for that tragic conflict on previous Democratic administrations and suggested that his predecessors had no program for ending the war. At the same time, he claimed unqualified success for his policies, including his Vietnamization program and the military invasions of Cambodia and Laos. The President also repeated his opposition to fixing a date certain for the withdrawal of all American troops from Indochina.[4]

DNC sent identical telegrams to the three networks requesting comparable time for the Democratic Party to respond to President Nixon's address. NBC and CBS denied the requests. ABC, however, agreed to provide one-half hour of prime time to permit spokesmen for the Democratic Party to discuss United States policy in Indochina and to explain the party's differences with the Nixon Administration on the issue of troop withdrawal. ABC fulfilled that commitment on April 22, 1971, when it presented a 30-minute program, entitled "Indochina: Another View," at 9 p.m., EST, on both television and radio. Six Democratic senators appeared on that program and stated their views on the Indochina conflict.[5]

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[4] App. A, p. 5a.

[5] ABC denied a request by the Republican National Committee (RNC) to respond to "Indochina: Another View." RNC sought relief in the Commission and the Commission denied RNC's com-

B. Proceedings in the Commission

On April 13 and 14, 1971, DNC filed four separate complaints with the Commission requesting that the Commission order (1) that NBC permit the Democratic Party to respond to the "Today" show interview and the April 7 Indochina address; (2) that ABC permit the Democratic Party to respond to the March 22 interview with Howard K. Smith; and (3) that CBS permit the Democratic Party to respond to the April 7 Indochina address. DNC asserted its right to the response time it sought under the Commission's fairness doctrine.

DNC made two separate and distinct fairness doctrine claims. First, DNC argued that the Commission should construe the fairness doctrine to impose upon broadcasters an obligation to afford time for those holding contrasting viewpoints to respond to each presidential broadcast appearance in which the President discusses controversial issues affecting the conduct of government. Second, DNC contended that the three presidential broadcast appearances at issue were partisan in nature and, for that reason, a response was required under the Commission's rulings in *Nicholas Zapple*, 23 F.C.C.2d 707 (1970), and *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018 (D.C. Cir. 1971).

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plaint in the same ruling in which it denied the relief sought by DNC in this case. App. C. The court of appeals affirmed that phase of the Commission's ruling in the same opinion in which DNC was denied relief. *Republican National Committee* v. *F.C.C.*, No. 71-1723 (decided February 2, 1972). DNC does not contest the action of the Commission and the court of appeals in denying RNC time to respond to "Indochina: Another View."

In their responses to DNC's complaints, the three networks asserted that the fairness doctrine required only that they achieve balanced programming on the controversial issues discussed by the President. They alleged that they had achieved the requisite balance in their programming and that their refusal to afford response time to the Democratic Party was therefore justified. In support of their claims of balanced programming, CBS and ABC listed several programs on which persons opposing the President's Indochina policies had presented their views. NBC supplied no such supporting data.

DNC filed a reply to the networks' responses. Noting that the networks had presented the factual defense of compliance with the fairness doctrine, DNC requested that the Commission conduct an evidentiary hearing so that the networks' factual contentions could be tested through the adversary process. DNC contended that such a hearing was the only available method for testing the validity of the networks' factual defense of compliance with the fairness doctrine.

The Commission denied DNC the relief it sought in a Memorandum Opinion and Order dated August 20, 1971. See Appendix C. Commissioner Johnson dissented without opinion.

The Commission first ruled that it would be "wholly inappropriate" to extend its *Zapple* and *Republican National Committee* rulings to cover presidential broadcast appearances, although it conceded that in such appearances the President is "most often engaged in setting forth the wisdom of . . . particular actions."[6] For that reason, the Commission tested the networks'

[6] App. C, p. 51a.

obligations under general fairness doctrine principles, which the Commission enunciated as "whether on an overall basis the networks have afforded reasonable opportunity for discussion of contrasting viewpoints on [the] varied issues" touched upon by the President.[7] The Commission concluded that "in view of the overall programming of the three networks, it cannot be said that the 'sum total' of any of the networks' efforts failed to satisfy the requirements of the fairness doctrine."[8] The Commission also observed that, "in terms of prime time coverage of the Indochina war, there is no evidence that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views."[9] Despite its no-evidence ruling, the Commission refused to order the evidentiary hearing requested by DNC.[10]

C. The Court of Appeals Decision

The court of appeals unanimously affirmed the Commission's ruling. The court agreed with the Commission that DNC's complaints should be tested by general fairness doctrine principles and it concluded that DNC had failed to carry its burden of showing a lack of balance by the networks in their coverage of the controversial issues discussed by the President.

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[7] App. C, pp. 53a-54a.

[8] App. C, p. 54a.

[9] App. C, p. 54a.

[10] In the same opinion, the Commission denied RNC's complaint against ABC seeking time to respond to "Indochina: Another View." See note 5, *supra*. As part of its complaint, RNC requested that the Commission order ABC to make available logs and other documents showing that network's coverage of the Indochina issue from February 8, 1971, to April 8, 1971. The Commission also denied that request. App. C, p. 55a.

Two themes run through the court of appeals' opinion. First, the court expressed the fear that granting the right to respond sought by DNC would discourage presidential use of the broadcast media to communicate with the American people and, thus, "abridge the right of the public to be informed."[11] Second, the court viewed the central enforcement mechanism of the fairness doctrine as the broadcasters' "voluntary good-faith compliance" with the requirement of balanced programming,[12] and it ruled that there should be no intercession by the Commission or the courts unless complainants make "a clear showing of abuse of discretion."[13]

DNC argued that the objectives of the fairness doctrine could be achieved with respect to presidential broadcast appearances only if a right to respond to all such appearances was recognized. That argument was grounded in prior Commission rulings and in the First Amendment. DNC noted that, in other contexts when the right to respond normally afforded was found to be inadequate, the Commission had created "specific corollaries" to the fairness doctrine to permit an effective response.[14] DNC also contended that, unless a right to respond to presidential broadcast appearances was

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[11] App. A, p. 26a.

[12] App. A, p. 28a.

[13] App. A, p. 28a.

[14] *Republican National Committee*, 25 F.C.C.2d 739, 742 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting Co.* v. *F.C.C.*, 454 F.2d 1018 (D.C. Cir. 1971). The "corollaries" referred to are the political spokesman doctrine created in the *Zapple* ruling and the Commission's personal attack and political editorializing rules approved by this Court in *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969).

recognized, the President would dominate the discussion on the broadcast media of controversial issues affecting the conduct of government.[15] That consequence would diminish "the right of the public to receive suitable access to . . . political . . . ideas and experiences" which is the central First Amendment concern in broadcasting. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969). The court of appeals rejected both of those arguments.

The court below also affirmed the Commission's refusal to conduct an evidentiary hearing[16] and to order ABC to produce its logs and other programming materials.[17] At the same time, however, the court of appeals expressed strong approval for the Commission's requirement that fairness doctrine complainants produce "specific and detailed evidence" of noncompliance with the fairness doctrine to have their complaints considered on the merits.[18]

REASONS FOR GRANTING THE WRIT

1. The Court has agreed to hear several cases involving the First Amendment obligations of broadcasters similar to the First Amendment issue presented by this case. *Columbia Broadcasting System* v. *Democratic*

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[15] See *Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

[16] App. A, pp. 38a-40a.

[17] App. A, pp. 29a-33a. The request for that material had been made by RNC, see note 10, *supra*, but DNC argued in the court of appeals that aspect of the Commission's ruling with respect to RNC's complaint was erroneous. DNC intervened in the RNC phase of the case in the court of appeals.

[18] App. A, pp. 29a-33a, 37a-38a. That procedural requirement finds expression in *Allen C. Phelps*, 21 F.C.C.2d 12 (1969), a ruling that the court below cited with approval.

National Committee, Nos. 71-863, *et al.,* 40 U.S.L.W. 3410 (Feb. 29, 1972). The issue in those cases is whether broadcasters can, consistent with the First Amendment, impose a flat ban on the sale of time to responsible individuals and groups for the discussion of public issues. The Commission endorsed that flat ban but the court of appeals reversed, holding that such a flat ban was in conflict with the First Amendment.

The issues in this case, while not identical to those in *Columbia Broadcasting System, et al.,* are sufficiently similar to warrant review by this Court. The central issue in *Columbia Broadcasting System, et al.,* is whether broadcasters can, consistent with the First Amendment, foreclose access to the broadcast media by those who wish to express their views on issues of public importance and who are willing to pay for the broadcast time they seek. The central issue in this case is whether a broadcaster who affords the President free time to present his views on controversial issues affecting the conduct of government can refuse to afford those holding significant contrasting viewpoints the same opportunity to present their views. As petitioner will show below, that issue raises serious First Amendment questions.

By agreeing to hear *Columbia Broadcasting System, et al.,* the Court has indicated it intends to continue its examination of the First Amendment obligations imposed on broadcasters, an examination begun three years ago in *Red Lion Broadcasting Co.* v. *F.C.C.,* 395 U.S. 367 (1969). That inquiry will be aided if the Court grants this petition and examines the related First Amendment issues in this case.

2. The central constitutional concern in the area of broadcasting is "the First Amendment goal of produc-

ing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *F.C.C., supra,* 395 U.S. at 392. Because of the limited number of broadcasting licenses available, the essential rights at stake are defined by reference to that goal.

> "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial." 395 U.S. at 390.

The decision by the court below in this case threatens those First Amendment rights.

The President of the United States occupies the most powerful office in the free world. By virtue of his constitutional powers and responsibilities and his status as the only public official elected by a nationwide constituency, he wields tremendous influence and power in shaping public opinion. It is, in the words of Clinton Rossiter, a "unique power to compel discussion in his own terms."[19] That power is magnified immeasurably when it is exercised through appearances on television —the most effective medium of communication ever devised by man.

The First Amendment goal of producing an informed public will be frustrated if broadcasters continue to provide the President with free broadcast time at his request while denying those opposing the President's views any effective right to respond. But broad-

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[19] C. Rossiter, *The American Presidency* 31 (Mentor, rev. ed. 1962).

casters have consistently followed that practice in the past, and the decision by the court below permits them to continue doing so. The dangers of such a practice were succinctly stated by the court of appeals in another decision:

> "[I]f the words and views of the President become a monolithic force, if they constitute not just the most powerful voice in the land but the only voice, then the delicate mechanism through which an enlightened public opinion is distilled, far from being strengthened, is thrown dangerously off balance. Public opinion becomes not informed and enlightened, but instructed and dominated." *Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

The President's unfettered access to television and its mass audiences to seek support for his programs and policies, combined with the inability of those opposing his programs and policies to obtain access to the same audiences, permits the President to dominate the discussion of controversial issues affecting the conduct of government. Such a consequence is in direct conflict with the constitutional policies defined by this Court in the *Red Lion* decision. But that is the necessary consequence of the court of appeals decision in this case.

The court below was apparently unable to perceive these ramifications of its decision. It agreed with petitioner that the First Amendment seeks to preserve broadcasting as an open forum for the robust and uninhibited discussion of public issues.[20] See *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). But it apparently feared that public discussion would be in-

[20] App. A, pp. 35a-36a.

hibited if a response to presidential broadcast appearances were permitted because the President would restrict his use of television. That unsubstantiated fear cannot justify abridgment of First Amendment rights. It is a negation of First Amendment values to permit broadcasters to use their power to insulate the President from criticism.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times* v. *Sullivan, supra,* 376 U.S. at 270. When issues affecting the conduct of government hang in the balance, the First Amendment does more than simply protect the right to speak; it preserves the very processes by which we have chosen to govern ourselves. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964).

The decision below means that only the President's voice and views will be heard clearly on critical issues. The public will be denied the exposure to competing viewpoints that is essential to an informed electorate. As a result, the public will be unable to exercise intelligently "the most effective check on the President: the opinions of the people of the United States." [21] As long as the broadcast media is the principal channel for communicating information and viewpoints on public issues, the First Amendment requires that it remain forum for open and robust discussion. The decision by the court below in this case is contrary to that constitutional command.

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[21] C. Rossiter, *supra* note 19, at 65.

3. Review by this Court is also warranted because the court below and the Commission have construed and applied the fairness doctrine in a manner that will defeat the doctrine's goal of assuring that listeners and viewers will be adequately exposed to contrasting viewpoints on controversial issues of public importance.

The court below was content to confine its fairness doctrine analysis to a recitation of general fairness doctrine principles.[22] The keystone of those principles is that a broadcaster, in his total public issue programming, must provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See, *e.g., Committee for the Fair Broadcasting of Controversial Issues,* 25 F.C.C.2d 283, 295 (1970). The broadcaster is permitted to satisfy that obligation in a variety of formats—on news shows or news interview programs or through the broadcaster's own comments or analysis. *Id.* at 295.

Petitioner does not quarrel with those principles as abstract propositions. But neither the court below nor the Commission were dealing with an abstract proposition in this case. The central question in this case is whether the general fairness doctrine principles relied upon by the court below and the Commission provide an adequate opportunity to present viewpoints contrasting with those advocated by the President in his broadcast appearances. The court below and the Commission failed to confront that critical issue because both chose to ignore the dynamic consequences of presidential use of television.

The drama of the televised presidential address and the audience it reaches permits the President to obtain

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[22] App. A, pp. 15a-22a.

instant consensus on his programs and policies. Reactions form before there is time for critical examination and evaluation. There is seldom a single focal point of opposition, and opponents must compete with the President's supporters for media attention in the period following a presidential address. Finally, the opposition has no access to the audience that the President addresses.

As construed and applied by the court below and the Commission, the fairness doctrine permits a broadcaster to limit the presentation of contrasting viewpoints to brief film clips on news programs, to responses to questions on news interview shows or to the broadcaster's own editorial comments. The President faces no such impediments when he obtains television time to address the nation. He has total control over the timing, format and content of the views he expresses on controversial issues. Denying those holding contrasting viewpoints similar opportunities falls far short of the goal of fairness in public issue programming.

In other contexts, when the Commission has recognized that the methods by which a broadcaster can satisfy his fairness doctrine obligations are inadequate, it has not hesitated to carve exceptions from that doctrine and create new rights to respond. For example, the Commission has imposed strict requirements on broadcasters to provide response time under its rules relating to personal attacks and political editorializing,[23] and this Court ruled in the *Red Lion* decision that those rules were consistent with the First Amendment. Similarly, the Commission has created the political spokesman doctrine which requires that, when spokes-

[23] 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679.

men for a major political party are given broadcast time to use as they see fit, spokesmen for the opposing party must be given comparable time.[24] The Commission has described each of those rules as a "corollary" to the fairness doctrine,[25] thus acknowledging that they impose obligations on broadcasters not required by general fairness doctrine principles.

Petitioner has asked the Commission in this case to do nothing more than it had already done with respect to the personal attack, political editorializing and political spokesmen corollaries, each of which represents an effort by the Commission to adjust the imprecise and, at times, ineffective commands of the fairness doctrine to the immense impact that the broadcast media can have in certain contexts. Such a rule is essential in this case if there is to be an effective opportunity to present views contrasting to those espoused by the President in his broadcast appearances.

The court below refused to come to grips with this central argument made by petitioner. The court, for example, observed that it was not its function to "give birth to a new corollary" to the fairness doctrine.[26] But petitioner made no such request of the court. It simply asked the court to rule that, in light of the corollaries already appended to the fairness doctrine, the Commission acted arbitrarily and contrary to the "public interest" standard of the Communications Act in refusing to recognize a right to respond to presidential broadcast appearances.

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[24] *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018 (D.C. Cir. 1971).

[25] *Id.*, 25 F.C.C.2d at 742.

[26] App. A, p. 41a.

At root, the court below was reluctant to disturb the unchecked discretion that broadcasters now enjoy under the fairness doctrine to deny a forum to those who oppose the views espoused in presidential broadcast appearances and who wish to express their viewpoints to the same audience that the President addresses.[27] But that discretion should not be permitted to abridge the right of viewers and listeners to be fully exposed to contrasting viewpoints on issues affecting the conduct of government. Indeed, "[t]his *carte blanche* licensee discretion has . . . been circumscribed . . . where it has been felt that an 'equal opportunities' approach might better serve the ends of fairness." *Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

Abstract fairness doctrine principles must yield when the failure to do so will defeat the goal of fairness that is implicit in the "public interest" standard of the Communications Act. The refusal of the court below to recognize and apply that fundamental precept warrants review by this Court. Otherwise, the policies that underlie the fairness doctrine and that were endorsed by this Court in the *Red Lion* decision will be subverted.

4. The court below approved two procedural barriers imposed on fairness doctrine complainants which in combination deny them any semblance of procedural fairness. First, the court accepted as reasonable the Commission's requirement that fairness doctrine complainants produce "detailed and specific evidence of failure to comply with the requirements" of the fairness doctrine before their complaints will be considered

[27] App. A, p. 28a.

on the merits.[28] *Allen C. Phelps,* 21 F.C.C.2d 12, 13 (1969). Second, the court affirmed the Commission's refusal to order a broadcaster to make available his logs and other programming materials for a determination of whether he had achieved the requisite balance in his public issue programming.[29]

Thus, on the one hand, a fairness doctrine complainant is told that he must come forward with "detailed and specific evidence" of noncompliance with the fairness doctrine. On the other hand, he is denied all access to a broadcaster's programming materials, the only available source of "specific and detailed evidence" of a broadcaster's coverage of controversial issues of public importance. In effect, the only person with the necessary knowledge of a broadcaster's fairness doctrine performance—the broadcaster himself—is insulated from any requirement of coming forward with the information the Commission needs to resolve the merits of a fairness doctrine complaint.[30]

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[28] App. A, pp. 29a-33a, 37a-38a.

[29] App. A, pp. 29a-33a. The request for program logs and other documents was made by RNC. However, DNC challenged the denial of access to those materials when it intervened in the RNC phase of the case in the court of appeals. See note 17, *supra.* In addition, DNC's request for an evidentiary hearing was based in part on the fact that such a hearing would provide a mechanism by which DNC could obtain access to such materials.

[30] The court below suggested that, since networks—as distinguished from licensees—are not required to maintain program logs, there is no basis for requiring them to produce such materials. App. A, p. 31a. But, because the networks regularly list prior programming in defending against fairness doctrine complaints, it is clear they do maintain programming materials. CBS and ABC in this case listed some programs that presented viewpoints contrasting with those of the President. The difficulty is that the networks invariably list only programming favorable to their position and do not provide adequate information to determine whether their total programming on a particular issue was balanced.

In this case, DNC sought to avoid those consequences by requesting an evidentiary hearing. But that request was denied by the Commission and the court below affirmed that action by the Commission.

The only practical alternative available to a complainant is to monitor the programming of the three major networks on a continuing basis. But no individual or group in society has the resources necessary to undertake such monitoring. Not even the Commission has such resources. See *Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994, 1005 (D.C. Cir. 1966); *Californians Against the Tax Trap Initiative*, 19 F.C.C.2d 507, 509-10 (1969) (dissenting opinion of Commissioner Johnson).

The effect of the procedural rulings by the court below will be to discourage complaints by those who have been denied an opportunity to present their views on controversial issues of public importance—complaints that have become the most important adjunct to the machinery for enforcement of fairness doctrine obligations. The Commission has a special obligation to assure that public participation in proceedings designed to assure compliance with the "public interest" standards of the Communications Act is not frustrated by technical procedural barriers. *Office of Communication of the United Church of Christ* v. *F.C.C.*, 425 F.2d 543 (D.C. Cir. 1969); see *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 430 (8th Cir. 1970). The procedural rulings by the court below will have an unhealthy chilling effect on such public participation in enforcement of the fairness doctrine.

Moreover, this Court's *Red Lion* decision makes clear that the fairness doctrine is affected with First

Amendment interests. This Court has long recognized that, when the burden of proof is at issue in a proceeding affecting First Amendment rights, the allocation of that burden is of constitutional concern.

> "[T]he procedures by which the facts of the case are determined assume importance as fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser* v. *Randall*, 357 U.S. 513, 520-21 (1957).

Petitioner's claims in this case were grounded in the First Amendment, and the Commission applied its procedural rules to block adequate consideration of those claims. DNC was denied relief, in part, because "there is *no evidence* that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views."[31] If there was a lack of evidence, it was because the Commission's procedural requirements prevented its development.

The Commission shows no inclination to dismantle the procedural barriers it has erected in the path of fairness doctrine complainants. Review by this Court is essential to assure that such complainants will be afforded the procedural fairness to which they are entitled.

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[31] App. C, p. 54a. (Emphasis added.)

CONCLUSION

For these several reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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